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## Formal Opinion 2007-05

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### [Ethical issues involved in lawyers use of pre-litigation pretexting](#)

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QUESTION:

During pre-investigation of possible infringement of intellectual property rights, may a lawyer employ private investigators to pose as potential customers under the pretext of seeking services of the suspected infringers in the same manner as a member of the general public?

ANSWER:

During pre-litigation investigation of suspected infringers of intellectual property rights, a lawyer may employ private investigators to pose as customers under the pretext of seeking services of the suspected infringers on the same basis or in the same manner as a member of the general public.

## DISCUSSION:

Rule 8.4(a), Alabama Rules of Professional Conduct, provides:

### “Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

It is well settled that a lawyer may not circumvent the rules of professional conduct by inducing another to engage in conduct that is prohibited by the rules of professional conduct. Therefore, where a lawyer engages a private investigator or any other third party and that person engages in conduct that is prohibited by the rules of professional conduct, the lawyer does not escape the disciplinary consequences as the misconduct committed by the private investigator or other party may be imputed to the lawyer. Whether the proposed conduct is a violation of the rules depends on consideration of the following:

Rule 4.2, Ala. R. Prof. C., provides:

### “Rule 4.2 Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

It is significant that Alabama Rule 4.2 uses the term “party” as opposed to the term “person”, which is used by the drafters of the Model Rules of Professional Conduct. Black’s Law Dictionary 1010 (5th Ed. 1979) citing *Golatte v. Matthews*, 394 F. Supp. 1203, 1207 (M.D. Ala. 1975) as follows:

“Party is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or a defendant, whether composed of one or more individuals or whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties.”

Rule 4.2 has no application to contact between a lawyer or his private investigators and persons who may potentially be parties in litigation that has yet to be filed. This opinion is not intended and does not address contact between a lawyer or a lawyer’s private investigators and parties, including employees of entity parties, that are protected by Rule 4.2, Ala. R. Prof., during pending litigation.

Rule 4.3, Ala. R. Prof. C., provides:

### “Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

With respect to the application of Rule 4.3, the Disciplinary Commission agrees with and adopts the rationale expressed by the court in *Apple Corps Limited, MPL v. International Collectors Society*, 15 F. Supp. 2d 456, 476 (D.C. N.J. 1998), wherein the court held as follows:

“It is clear from the language of R.P.C. 4.3 that it is limited to circumstances where an attorney is acting in his capacity as a lawyer – ‘dealing on behalf of a client.’ See R.P.C. 4.3, See also *Isbell* and

Salvi, *supra*, 8 Geo. J. Legal Ethics at 824. Therefore, its prohibitions on allowing the unrepresented person to misunderstand that the lawyer is disinterested only apply to a lawyer who is acting as a lawyer. *Id.* at 825.”

Consistent with the foregoing, in the pre-litigation context, where a lawyer or his investigator is acting in the capacity of an investigator and merely presenting to targets as potential customers under the pretext of seeking services as any other member of the general public, they are not acting as a lawyer and Rule 4.3, Ala. R. Prof. C., does not apply.

Additionally, Rule 8.4(c), Ala. R. Prof. C., provides:

“Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

\* \* \*

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

The Disciplinary Commission agrees with and adopts the rationale expressed by the court in *Apple*, 15 F. Supp. 2d 456, 476, wherein the court held that lawyers and private investigators conducting a pre-litigation investigation may misrepresent their identity and purpose to detect ongoing violations of the law where it would be difficult to discover those violations by any other means. Such misrepresentations, limited in scope to identity and purpose, do not constitute “dishonesty, fraud, deceit or misrepresentation” proscribed by Rule 8.4(c), Ala. R. Prof. C.

To the extent that *Apple*, 15 F. Supp. 2d 456; and *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp. 2d 119 (S.D. N.Y. 1999) would apply to pre-litigation investigation, the Disciplinary Commission adopts the rationale and holdings of those decisions. The Disciplinary Commission opines in the pre-litigation context a private lawyer may use an undercover investigator to investigate possible infringement of intellectual property rights posing as customers under the pretext of seeking services of the suspected infringers and may misrepresent their identity and purpose as long as their contact with suspected infringers occur in the same manner and on the same basis as those of a member of the general public seeking such services.

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